

J. J. [unclear]



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Survival Products, Inc.

File: B-235431.3

Date: November 16, 1989

DIGEST

Where the protester and the other bidder each proposed a different method of shipping what arguably is a hazardous material, General Accounting Office sustains protest because solicitation was ambiguous as to the permissible shipping methods.

DECISION

Survival Products, Inc., protests the award of a contract to Van Ben Industries, Inc., under invitation for bids (IFB) No. DLA400-89-B-1599, issued by the Defense General Supply Center (DGSC), Defense Logistics Agency (DLA), for the supply of solid fuel tablets used for the emergency heating of food rations. Survival contends that Van Ben's bid is nonresponsive because, under the terms of the solicitation, the supplies cannot be packed for shipment as Van Ben proposes in its bid.

We sustain the protest.

The IFB was issued on February 7, 1989, and bid opening was March 23. Closely-priced bids were received from Van Ben and Survival. Since bid opening, both bidders have filed protests concerning the shipping requirements of this solicitation. Survival filed its first protest on April 10, when the contracting officer originally determined that Van Ben was the low, responsive and responsible bidder. On May 17, after Van Ben verified data it had submitted concerning the dimensions and characteristics of its proposed shipping methods, the contracting officer rejected Van Ben's bid as nonresponsive. Survival then withdrew its protest and Van Ben filed a protest. By letter dated June 30, the contracting officer reversed her earlier decision and determined that Van Ben's bid was responsive to the shipping requirements of the IFB and that the firm would be considered for award. Van Ben then withdrew its

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protest and this protest from Survival followed. Due to urgent and compelling circumstances, award was made to Van Ben on July 27.

The items being acquired here are small, flat, rectangular bars of solid fuel which when ignited are used in the field for the emergency heating of food rations and water. The bars are made by compressing several ingredients, one of which is trioxane. The bars are hermetically sealed in aluminum foil; the foil packets are in turn placed in intermediate packages and packed into larger cardboard cartons which are placed on and secured to wooden pallets for transportation and storage purposes.

All the protests which have been filed concerning this procurement stem from the fact that Van Ben indicated in its bid that it would be shipping the fuel bars in a "container" whose length and width were greater than that of the standard-sized pallet used by the military. As clarified by Van Ben after bid opening, this meant that Van Ben proposed to ship the fuel bars in cartons of such a size and configuration that when stacked flat, the cartons would overhang the sides and ends of the pallet. Van Ben and DLA maintain that this method of shipment is permitted by the terms of the solicitation. Survival contends that under the terms of the solicitation the supplies must be packed for transport in such a way that the load does not overhang the edges of the pallet, particularly since trioxane is a "hazardous material."

For the reasons stated below, we conclude that the solicitation's shipping requirements were ambiguous, as a result of which each of the bidders proposed to ship by a different method at different shipping costs, such that the relative standing of bidders could have been affected. We therefore are recommending that DLA suspend performance of Van Ben's contract; resolicit this requirement under shipping terms which will place bidders on a clear and equal footing; and terminate Van Ben's contract for the convenience of the government if under the resolicitation it is not the low responsive and responsible bidder.

In the IFB's clause F4, "Guaranteed Maximum Shipping Weights and Dimensions," each bidder was to indicate the weight, type and size of each shipping container it would use, the number of units packaged in each container and shipping characteristics. The purpose of this type of clause is to enable the government to ascertain its total cost for a proposed contract and to establish the basis for a contract price reduction in the event the maximum guaranteed shipping

weights or dimensions are exceeded. Trojan Indus. Inc., B-220620, Feb. 10, 1986, 86-1 CPD ¶ 143. We previously have held that bidders may understate or overstate guaranteed weight or dimensions, but they must take care to do so only in circumstances where they do not create doubt as to their intent to comply with the specification. See Silent Hoist & Crane Co., Inc., B-210667, Dec. 23, 1983, 84-1 CPD ¶ 16.

In clause F4 of its bid, Van Ben stated that it would pack 1,200 fuel bars per case, 18 cases to a pallet, with an overall size of 61 inches by 43 inches by 45 inches high. As subsequently clarified by Van Ben in response to Survival's earlier protest, these overall dimensions reflected the use of cartons or cases 30-1/2 inches by 14-1/4 inches by 13 inches stacked flat and bound together ("unitized") on a wooden pallet 40 inches long by 48 inches wide. Since the length of the cartons (61 inches) exceeded that of the pallet (48 inches) by 13 inches, this meant that the cartons would overhang the pallet by 6-1/2 inches on two sides. Similarly, the 3-inch discrepancy between the load's dimension of 43 inches and the pallet's 40 inches meant that the load would overhang the pallet by 1-1/2 inches on the other two sides. The protester, in contrast, agreed in its bid to use the government-developed shipping data, which indicated the use of cartons on pallets, with a container size of 40 inches long by 48 inches wide, i.e., with a load size equal to the length and width of the pallet with no overhang.

The protester contends that the dimensions Van Ben supplied in clause F4 rendered its bid nonresponsive because the size of Van Ben's shipping load is prohibited by clause 45X of the IFB.

The solicitation's clause 45X, "Preparation for Delivery," addresses the use of palletization (used by Survival) and unitization (used by Van Ben). Although the clause consists of two full pages of small type, its principal elements relevant to this protest are as follows:

- "1. All shipping containers shall be palletized IAW [in accordance with] the requirements cited in MIL-STD-147C [Military Standard 147C]1/

1/ Military Standard 147C "establishes the methods, materials and techniques to be employed in the formation of bonded palletized unit loads of military supplies which are adaptable to such unit loading. The methods prescribed

(continued...)

Exceptions to MIL-STD-147C are cited below. These exceptions take precedence over MIL-STD-147C. . . .

"2. All hazardous materials, whether destined for export or for domestic/conus, shall be palletized IAW load type VI of MIL-STD-147C [Load type VI includes special storage aids to protect the load and give it stability. Paragraph 2 also includes other special palletization instructions.]

"3. Unitization

A. Shipping containers and/or material that does not lend itself to the use of MIL-STD-147C palletization patterns^{2/} due to size, weight, configuration, etc., shall be unitized by securely banding the load on a skid base or a commercial type pallet. . . ."

Survival's principal argument is that trioxane is a "hazardous material" which must be prepared for shipment in accordance with paragraph 2 of clause 45X, including the requirement that all such materials be palletized on a deck 40 inches long by 48 inches wide, which dimensions apply to the overall, palletized load. The protester states that the purpose of applying more restrictive requirements to shipments of hazardous materials is to afford them greater protection from damage. Survival argues that to permit the load to overhang the pallet by as much as 6-1/2 inches increases the likelihood that the cartons may be damaged--e.g., by lift truck forks--and that the foil packets may be ruptured, which would permit trioxane vapors to escape. In any event, Survival contends, trioxane can be packaged in

1/(...continued)

herein are to be utilized with the standard, general purpose 40" x 48" pallet" The standard indicates that these dimensional limitations apply to the complete load, including pallet, bonding and storage aids with "minimal," if any, overhang of the load over the edges of the pallet.

2/ Container size affects how many of them can be efficiently stacked on a pallet. The military standard includes charts and illustrations for determining which of 124 different patterns may be used to stack containers of different sizes on a pallet.

containers that do lend themselves to palletization.^{3/} Therefore, Survival argues that the unitization exception in paragraph 3 of clause 45X is not applicable and Van Ben's bid is nonresponsive.

In addition, Survival notes that the difference in bid prices was less than one cent per unit. It contends that the savings which Van Ben can realize from purchasing fewer pallets and shipping in fewer truckloads may account for part or all of this difference. Therefore, it argues that Van Ben obtained an unfair price advantage by using a method of shipping which was not permitted under the terms of the solicitation.

The agency disputes that trioxane is a "hazardous material" for the purposes of paragraph 2 of clause 45X. Even if it is hazardous, DLA argues, Van Ben can unitize the load under paragraph 3 because Van Ben's shipping container does not lend itself to the use of MIL-STD-147C palletization patterns and paragraph 3 is not limited by its own terms only to non-hazardous materials. Further, the agency says that paragraph 3 of clause 45X does not limit the size of the pallet which can be used to unitize the load or the size of the unitized load itself. Therefore, the agency argues that the data entered by Van Ben in clause F4 does not qualify its bid.

We conclude that the solicitation was flawed in two respects, as a result of which each bidder proposed a different method of preparing the supplies for shipment. First, we think the solicitation is ambiguous as to whether a bidder is required to palletize if that shipping method is at all feasible for the commodity involved or may elect to use containers whose size and/or configuration does not lend themselves to palletization, thus permitting unitization. Second, DGSC did not clearly define in its solicitation whether trioxane was a "hazardous material" for the purposes of shipments made to the Center.

As for the first point, we note that clause 45X begins with the general statement in paragraph 1 that all shipping containers shall be palletized in accordance with Military Standard 147C. It then states that "exceptions" to the

^{3/} As we indicated, Van Ben elected to pack the trioxane in packs of 1200 units. According to Survival, 1200-unit packs can be packaged to fit 12 different palletization patterns permitted by MIL-STD-147C. Further, Survival points out that in its own bid it did not take exception to the palletization requirement.

military standard "cited below . . . take precedence" over it. There is a paragraph 2, which deals with hazardous materials and a paragraph 3, entitled "Unitization." We understand paragraphs 2 and 3 to represent the "exceptions" to the general palletization requirements contained in the military standard and imposed by paragraph 1. In other words, the shipment of "hazardous materials" or "containers and/or material" which does not "lend itself" to the use of palletization represent special situations in which shipping methods which differ from the usual are to be used.

What is not clear is that a bidder has the power to bring itself within the unitization exception simply by electing to use containers which do not lend themselves to palletization. Certainly, there may be instances where the size, weight or configuration of the material itself which is being shipped precludes palletization. This is not such a case. There is nothing inherent in the fuel bars here which precludes their being palletized for shipment. Survival contends that paragraph 1 of clause 45X establishes a general preference for palletization, and since the fuel bars lend themselves to that method of shipment, it must be used. The contracting agency and Van Ben argue, however, that a bidder is free to avail itself of unitization where, as here, the shipping containers which a bidder has selected for use do not lend themselves to palletization. Literally read, clause 45X is reasonably susceptible to that interpretation--while the clause expresses a general preference for palletization, it also has a unitization "exception" which does refer to shipping containers "and/or" material, thus suggesting that if either a shipping container or the material to be shipped is not appropriate for palletization a unitization approach may be used. On the other hand, Survival's interpretation provides a logical order of priority among all the clause's provisions. Stated another way, the clause first establishes a palletization requirement, and it is difficult to understand why the clause would then also allow the shipper to avoid the requirement by selecting a shipping container that does not fit on the standard pallet. In short, we think it is at the least unclear when the unitization exception is available to a bidder.

Second, we think the solicitation is not at all clear as to whether these fuel bars are "hazardous materials" within the context of paragraph 2 of clause 45X. This is an issue the parties have discussed at length. Clause 45X does not define "hazardous materials"--it only prescribes how such materials are to be prepared for shipment--and nowhere does the solicitation squarely address the issue. In support of its position that trioxane is "hazardous," the protester

principally relies on another solicitation provision which requires bidders to certify whether the material is hazardous under certain standards and if so, to submit as part of contract performance, material safety data sheets (MSDSs). These sheets provide a variety of data important to the safe handling and disposal of the material, such as what type of fire extinguisher is appropriate; first aid procedures; and how to dispose of the material in an environmentally safe manner. The protester argues that trioxane meets at least one of the standards for a hazardous material referenced by this provision. Even if the preparation of MSDSs is required,^{4/} DLA questions whether a characterization of a material as "hazardous" under standards relating to occupational safety and health governs how that material is to be packed for transport, especially since the Department of Transportation does not list "trioxane," solely and by name, as a hazardous material.

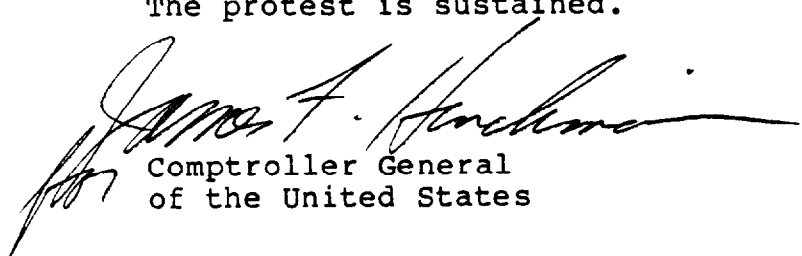
Here we have a solicitation which does not explicitly state that the items being bought are hazardous materials for purposes of how they are to be prepared for delivery. In the absence of such an express statement, it could be concluded--and Van Ben and DLA so argue--that one need not take special precautions in preparing the items for shipment. On the other hand, there are indicia in the solicitation that the items may be hazardous: clause 45X includes instructions for the shipment of hazardous materials; there is another solicitation clause, 47I, which Survival points out prescribes special container markings for "hazardous and dangerous items" and for flammable items having a flash point even higher than that of trioxane; and, as noted above, there is a provision requiring the contractor to submit MSDSs if the item is "hazardous" under certain standards. The inclusion of these provisions would suggest that the shipping requirements applicable to hazardous materials should be followed.

Given how the bidders and even the contracting officer interpreted these provisions, we conclude that the solicitation was ambiguous. Further, given the relative closeness of the bids, and the absence of evidence to the contrary in

^{4/} We note that in its bid, Survival certified that trioxane was not hazardous for the purpose of submitting MSDSs (allegedly because Survival could not obtain a copy of the relevant federal standard before preparing its bid), but contends in its protest that it is hazardous for shipping purposes. Conversely, in its bid Van Ben certified that trioxane was hazardous for the purpose of submitting MSDSs, but argues that it is not such for purposes of shipping.

the record, we find that these ambiguities may have affected the outcome of the bidding. Accordingly, we recommend that performance under Van Ben's contract be suspended; that DLA reexamine its requirements concerning the packing and shipment of this item, and that it resolicit under provisions which clearly set forth its needs; and that Van Ben's contract be terminated for the convenience of the government should it not be the low, responsive and responsible bidder under the resolicitation. Survival is also entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Survival should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.



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